DR. NOBLITT NOT GUILTY

Circuit Judge Finds No Law to Convict.

WILL ACQUIT HIM AGAIN

Revocation of License Not a Bar to His Practicing Medicine.

Dr. Noblitt is again free to pursue the practice of medicine in Hawaii. Circuit Judge Humphreys rendered a decision yesterday in favor of the physician in which he declared that the doctor could not be prosecuted under the law for practicing medicine "without a license" inasmuch as there was no penalty prescribed in the Penal Code by which Dr. Noblitt could be prosecuted and convicted.

There is a peculiarity in the laws surrounding the practice of medicine in Hawaii and the penalties attached for non-compliance with the statutes. The decision of the Circuit Judge hinges almost entirely on a clause which provides that no one shall practice medicine without "first having obtained" a license. In the case of Dr. Noblitt he was passed upon by an examining board of the Health Department and a recommendation made that he be granted a license to practice. He then obtained his license and practiced his profession, until the Board took action in his case and recommended by a resolution to the Minister of the Interior under the Republic of Hawaii, that the license be revoked because of alleged unprofessional conduct on the part of Dr. Noblitt.

After being prosecuted in the lower court for practicing medicine without a license which the doctor clearly did not possess after its revocation, a recent case was appealed to the Circuit Court. The law, providing that no one shall practice medicine without "first obtaining a license" provides no punishment for violations thereof, and the term "having first obtained" reverts back to the original issuance of a license. Hence the decision of the Circuit Judge.

The decision in full is as follows:

The defendant W. S. Noblitt was indicted at the November term, A. D. 1899, of the Circuit Court of the First Circuit, for practicing medicine contrary to law. On December 4th, 1899, a judicial day of said term, a stipulation for trial in vacation, jury waived, was filed by the Attorney General and the defendant. Under that stipulation the case was heard by me at chambers on the 18th day of December, A. D. 1900. The laws of Hawaii provide in substance that no person shall practice medicine or surgery as a profession in the Hawaiian Islands, without having first obtained a license from the Minister of the Interior, and that such license shall only be granted upon the written recommendation of the Board of Health; that no person shall be recommended by the Board of Health for a license to practice medicine or surgery except upon the written report of a board of medical examiners which is authorized to examine all applicants for such license. The laws further provide that said board of medical examiners shall consist of three licensed physicians or surgeons to be appointed by the Minister of the Interior. Provision is also made for the revocation of a license to practice medicine and surgery by the Minister of the Interior at any time for professional misconduct, gross carelessness or manifest incapacity, such misconduct, carelessness or incapacity having been proven to the satisfaction of the Board of Health and by that body reported in writing to said Minister. The practice of medicine and surgery "without having first obtained" the license before referred to is denounced as a misdemeanor and is attended with a severe penalty. It will be observed that the right of an applicant to a license depends upon the report of the board of medical examiners, all of whom are required to be licensed physicians and surgeons—that the right may be annulled by the Minister of the Interior upon the report of the Board of Health, independent of the board of medical examiners, that a majority of the Board of Health are laymen (section 868, Penal Laws, 1897). It may be remarked in passing that the law creating the Board of Health is but one of the many illustrations to be found on our statute books of the settled policy of those who controlled the destinies of the Republic of Hawaii to center and make dominant all governmental power and authority in the Executive. None of the members of the Board are elected by the people; they are all appointed by the President and to preserve and maintain the power and influence of the Executive in this body—theoretically independent—it is provided that the Attorney General, who is also appointed by the President, shall be ex officio a member of the Board.

The evidence adduced in this case shows that on the 2d day of March, A. D. 1898, the defendant obtained from the Minister of the Interior a license in the manner required by law upon the written recommendation of the Board of Health, and that said license was revoked by the Minister of the Interior for his professional misconduct, on the 24th day of August, A. D. 1899, proven to the satisfaction of the Board of Health, of which the defendant had notice; and that since the revocation of his license as aforesaid the defendant has been engaged in the practice of medicine as a profession. While the conclusion reached by the Board of Health as to the case of this defendant cannot be attacked collaterally, yet the evidence offered by the prosecution, not objected to by the defendant, and heard by the Court is a legitimate and proper subject of comment. That evidence clearly shows that the prosecution of this defendant before the Board of Health was inaugurated upon charges preferred against him by the Marshal of the Republic of Hawaii in his official capacity; that the Marshal is a subordinate of the Attorney General and under his direction and control. The Attorney General at that time was ex officio a member of, and President of the Board of Health. He presided over the session of the Board at which judgment was passed upon the defendant; he denied him an exception to his ruling and finally, while still in the chair made an argument in support of the charges. In hearing and determining the charge preferred against the defendant, the Attorney General, as a member ex officio and president of the Board, acted in a quasi judicial capacity, as did all of the other members of the Board, calling for the exercise of candid and impartial judgment and sound legal discretion.

State ex. rel. Hathaway vs. State Board of Health, 103 Mo. 22-28.

To sit in judgment upon the right of one to practice a vocation which is the source of support for himself and family and for which he has qualified himself by education, study, observation and experiment, and to humiliate and degrade him in the estimation of the community by abrogating that right, is a responsibility which ought not to be assumed by one who may—even though he does not—direct and control the prosecution. Where a sense of common fairness does not tell us what is right, the law at least should tell us what is wrong and telling us prohibit it.

The law provides a penalty for practicing medicine or surgery, "without having first obtained" a license as provided by the statute. Practicing medicine after the revocation of the license is not denounced nor is there any penalty attached to it. It is true, as remarked by Judge Bartlett in Collister vs. Fassett, 163 N. Y. 281, that "no case has a brother," yet the case of Ex parte McNulty, 77 Cal. 164, is as much, like the case at bar, both as to the facts and the law under which it was sought to sustain the conviction, as it is possible for two cases arising in different jurisdictions to be. In that case, McNulty obtained the requisite license for the practice of medicine in the State of California, which license was subsequently revoked for unprofessional conduct. He continued to practice his profession after the revocation of his license and upon being convicted and sentenced in the Superior Court of the City and County of San Francisco obtained his discharge in the Supreme Court of California on habeas corpus, the Court holding—seven Judges on the bench, one dissenting—that as the statute only made it an offense to practice "without having first procured" a certificate, and provided no penalty for practicing after the revocation of the certificate, such a conviction could not be upheld.

It was argued that the case of this defendant was clearly within the mischiefs intended to be prohibited by the Legislature. I am inclined to think so, too; but I can not find this defendant guilty of a crime by construction. The statute under which this prosecution is based is penal—highly penal in its provisions. It provides for a heavy fine, and logically results in forever prohibiting the defendant from practicing a profession to which he has wedded many of the best years of his career. That such statutes are to be construed strictly against an offender and liberally in his favor is a proposition which I have never heard disputed. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character with those which are enumerated. "If this principle," said Chief Justice Marshall in United States vs. Wilterberger, 5 Wheat. 76, "has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule."

See United States vs. Sheldon, 2 Wheat 119; Daggett vs. State, 6 Conn. 60; United States vs. Morris, 14 Peters 464.

Courts in construing statutory offenses have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the Legislature, lest otherwise they shall hold an act or omission to be a crime, and punish it, when in fact the Legislature never so intended. "If this rule is violated," said Chief Justice Best, "the fate of the accused person is decided by the arbitrary discretion of the Judges, and not by the express authority of the laws."

Fletcher vs. Lord Sondes, 3 Bing. 580.

It will at once be conceded that no man should be stripped of a very valuable property and consigned to ignominy and reproach unless it be very clear that such high penalty have been annexed by law to the act which he has committed. "It is more consonant to the principles of liberty," says an eminent English Judge, "that a court should acquit when the Legislature intended to punish, than that it should punish when it was intended to discharge him with impunity."

See United States vs. Clayton, 2 Dill. 219.

The Attorney General evidently realized the difficulties presented by this case for in drawing the indictment he did not follow the language of the statute and charge the defendant with having practiced medicine "without having first obtained" a license, but he charges him with practicing medicine "without having a license so to do," whereas there is no such offense created by the laws of Hawaii.

I find that there is no law authorizing the conviction of the defendant in this case and it will be my duty when and so often as he is prosecuted under a similar state of facts, to discharge him by the appropriate process of the Court.

Let defendant be discharged.

HUMPHREYS.
First Judge, First Circuit Court.
Dated, Honolulu, Oahu, Dec. 19, 1900.